NO. 22546

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LEE ARNOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

JURISDICTIONAL STATEMENT

Appellant JOHN LEE ARNOLD was indicted by the Federal Grand Jury for the Central District of California on November 30, 1966 [C. T. 2, 3]. 1/ The indictment was in two counts and charged the defendant with robbery of the United California Bank, Wilshire-Catalina Office, on October 5, 1966, and the robbery of the Mission National Bank of Los Angeles on October 11, 1966 [C. T. 2, 3]. The count involving Mission National Bank included a charge that the defendant forced an

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1/ C. T. refers to Clerk's Transcript.

individual in the bank to accompany him without his consent. Arnold was arraigned on July 31, 1967, before the Honorable William P. Gray, United States District Judge [C. T. 5]. On July 1, 1967, the court appointed Mario Gonzalez as counsel for the defendant, the defendant pleaded not guilty as charged in both counts and the case was transferred for all further proceedings to the calendar of the Honorable Judge Albert Lee Stephens, Jr., United States District Judge [C. T. 5].

On September 19, 1967, the defendant moved to discharge his attorney as his counsel of record and the court granted the motion and relieved Mr. Gonzalez [C. T. 12].

On the same date, September 19, 1967, a jury trial commenced in the courtroom of Judge Stephens [C. T. 12]. On September 20, 1967, the jury returned with a verdict of guilty on both counts [C. T. 13-15].

On October 31, 1967, the court ordered the defendant committed to the custody of the Attorney General for a period of 21 years on count one, and 21 years on count two, with the sentence on count two to run concurrently with count one [C. T. 17]. On October 31, 1967, the defendant filed his notice of appeal to the United States Court of Appeals for the Ninth Circuit [C. T. 19].

On March 19, 1968, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the court corrected the initial sentence from 21 years to 20 years on both counts [C. T. 20, 21].

II

STATEMENT OF FACTS

On October 5, 1966, the defendant entered the United California Bank, Wilshire-Catalina Office, 3343 Wilshire Boulevard, Los Angeles, California [R. T. 77, 79]. 2/ He approached the teller window of Miss Jo Bushman and placed a demand note on the counter [R. T. 78]. It read, "Put all the money in the bag. Try to be funny and I will blow your guts out. All the money." [R. T. 78]. After reading the note, Miss Bushman took money from her cash drawer and placed it on the counter [R. T. 79]. Defendant grabbed the money and left the main entrance of the bank out onto Wilshire Boulevard [R. T. 80]. The audit revealed a loss to the bank in the sum of $1,960.00 [R. T. 119].

About six days after the first bank robbery of October 5, 1966, the defendant entered another bank, on Wilshire Boulevard on October 11, 1966 [R. T. 132]. The institution was the Mission National Bank of Los Angeles, located at 3143 Wilshire Boulevard [R. T. 128]. At approximately 2:00 P. M., the defendant approached the teller window of Miss Anne-Lise Espegren and demanded money of her [R. T. 131-132]. At this time the Assistant Cashier, Mr. Hector Mokhtarian, also approached the teller via the customer area, stood close to the defendant, and inquired if there was any problem [R. T. 131].

2/ R. T. refers to Reporter's Transcript.

The defendant then threatened Mr. Mokhtarian and ordered him to instruct the teller to give him her money or he would kill both of them [R. T. 131]. Mr. Mokhtarian, in fear, told the teller to place the money from her cash drawer onto the counter [R. T. 132]. She complied and defendant grabbed the money, approximately $1,386.00 [R. T. 138]. The defendant then turned to Mr. Mokhtarian and said, "You are coming with me." [R. T. 133]. The defendant then forced Mr. Mokhtarian to walk slowly ahead of him from the teller window to the inside entrance of the bank on Wilshire [R. T. 133-134]. At this point, the defendant ordered Mr. Mokhtarian to turn right, remaining inside the bank, and then he himself fled in an easterly direction on Wilshire Boulevard in the vicinity of Bullock's Wilshire [R. T. 135-136]. He entered a Corvair automobile that he had purchased and paid for in cash the day after the first bank robbery [R. T. 180-183], and then drove off at a high rate of speed [R. T. 137].

III

ARGUMENT

A. THE DEFENDANT MADE AN INTELLIGENT AND COMPETENT WAIVER OF HIS CONSTITUTIONAL RIGHT TO COUNSEL

The defendant contends that he did not make an intelligent and competent waiver at trial of his constitutional right to counsel [App. Br. 7-10]. This Honorable Court has been faced with this contention on prior occasions and has outlined certain principles of law which are directly applicable to the instant case.

The first principle was clearly enunciated by this Court in Duke v. United States, 255 F. 2d 721 (9 Cir. 1958), cert. den. 357 U.S. 920, 78 S.Ct. 1361, 2 L.Ed. 1365 (1958). It is the simple proposition that ". . . an accused has an unquestioned right to defend himself." Duke v. United States, supra, at p. 724. The Court made specific reference to 28 U.S.C. §1654:

> "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. . . ."

A second principle is that " . . . an accused should never have counsel not of his choice forced upon him." Duke v. United States, supra, p. 724. As the Supreme Court of the United States has phrased it:

> "The Constitution does not force a lawyer upon a defendant."

Adams v. United States, ex rel. McCann,

317 U.S. 269, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942).

The third principle is that an accused may thus waive a right to counsel. Watts v. United States, 273 F.2d 10 (9 Cir. 1959). Or as stated by Circuit Judge Lumbard of the Second Circuit:

> " . . . The petitioner contends that he could not have had a fair trial because, as a mental defective, he was not able intelligently to defend himself. It is true that the mental inadequacy of the accused may necessitate the appointment of counsel in order to satisfy the requirements of due process. Palmer v. Ashe, 1951, 342 U.S. 134, 72 S.Ct. 191, 96 L.Ed. 154. But it is equally true that when the right to counsel is explained and an offer to appoint counsel is made, a competent defendant may refuse the offer and thereby waive the right to have counsel appointed."
> United States v. Cummings, 233 F.2d 190, 194 (2 Cir. 1956).

See also Adams v. United States, ex rel. McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268 (1942); Lipscomb v. United States, 209 F.2d 831 (8 Cir. 1954), cert. den. 347 U.S. 902, 74 S.Ct. 711, 98 L.Ed. 1105 (1954); Hanes v. United States, 203 F.2d 561 (4 Cir. 1953); Smith v. United States, 216 F.2d 724 (5 Cir. 1954).

"When he takes such steps voluntarily and intelligently," as this Court has held, "he will not later be heard to complain that his Sixth Amendment rights have been impaired. Johnson v. Zerbst, 1938, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461; Michener v. Johnston, 9 Cir. 1944, 141 F.2d 171, 174-175." Watts v. United States, supra, p. 12.

In the case at bar, the trial judge took every effort to insure an intelligible and competent waiver. The court advised the defendant of the seriousness of the charge [R.T. 5, lines 18, 19]. The court informed the defendant that the court-appointed lawyer, Mario Gonzalez, was an " . . . experienced lawyer, and could undoubtedly be of assistance to you, and he is willing" [R.T. p. 6, lines 1, 2], and that "There is no substitute for the experience that lawyers have in these matters." [R.T. 9, lines 13-14.]

The court made it clear that despite defendant's past record, he was on trial solely on the charges in the indictment [R.T. 8, lines 2, 7], but that if he chose to testify on his own behalf the fact of his prior felony could be brought to the attention of the court [p. 8, lines 23-25, p. 9, line 1].

As stated in Watts v. United States, supra, p. 12:

"The trial judge explained to him the responsibilities incurred by a defendant

who represents himself, but he would not be deterred."

And in the instant case, the defendant would not be deterred. He had prepared himself by studying law in prison. As the defendant himself stated, " . . . In the last year I have studied almost everything that I can find. I have law books in my cell in Leavenworth. I spend all my time continuously studying those." [R. T. 5, lines 5-6]. The defendant wanted to " . . . Present my own case to the jury." [R. T. 7, lines 20-21]. And as the defendant stated " . . . Regardless of what the consequence is, and to my own self, I would think that maybe I could have done something that he [attorney Gonzalez] didn't." [R. T. 9, lines 23-25].

The defendant had no quarrel with his appointed counsel, but simply wanted to defend the case himself [R. T. 11, lines 4-5]. As the defendant stated, "Mr. Gonzalez has been very nice. He has been over to see me various times. I don't know exact times, but he has been over numerous times. I don't know how many." [R. T. 10, lines 10-13].

The record further reflects, in the words of the defendant, that the court-appointed attorney had to persuade the defendant not to waive counsel. "I thank Mr. Gonzalez for all his treatment he gave me. He has been extremely nice, and he has tried his best to convince me that I should go with the counsel, that he would do the best for me." [R. T. 11, lines 6-9].

But the persuasion of the court and appointed counsel were to no avail and defendant went to trial, defending himself.

The conduct of the trial further reflects that defendant was no stranger to the procedures of court. As an example, with no prompting, he initially requested the exclusion of all witnesses not presently testifying [R. T. 13, lines 13-17].

Every effort was made to assist the defendant by both court and prosecutor. A copy of a witness' statement was furnished to the defendant in order to assist him in his cross-examination [R. T. 81]. A review of defendant's cross-examination of the witness revealed his ability to use the statement [R. T. 81-96].

In connection with the jury instructions, the trial judge furnished the defendant with a copy of Mathes and Devitt's book [R. T. 224]. The court then took considerable time in explaining each of the instructions to the defendant [R. T. 224-238].

Considering the entire record, it is abundantly clear that defendant has in no way met the burden of showing that his waiver of counsel was not intelligently made.

As stated by this Court:

> "The burden of proof in showing that a waiver of counsel was not intelligently made rests upon the party contesting the validity of the waiver. See Johnson v. Zerbst, supra, 304 U.S. at pages 468-469, 58 S. Ct. 1019; Michener v. Johnston, supra, 141 F. 2d at page

175; cf. Wilken v. Squier, 1957, 50 Wash. 2d 58, 309 P. 2d 746. Appellant has not met this burden."

Watts v. United States, supra, p. 12.

B. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW DISMISSAL OF A PORTION OF THE INDICTMENT, NOR IN NOT ADVISING DEFENDANT OF A RIGHT TO PLEAD NOT GUILTY BY REASON OF INSANITY

On the first day of trial, upon first hearing that the defendant was going to waive his right to counsel, the Government informed the court that the death penalty would not be requested [R. T. 6, lines 12-17]. The Government then moved the court to dismiss that portion of Count Two of the indictment relating to kidnapping [R. T. 17].

The court denied the motion [R. T. 18], and now the defendant alleges this denial as error. The defendant, however, fails in his brief to mention how in any way he was prejudiced by the court's ruling. An examination of the record furthermore reveals no such prejudice. The ruling was one within the sound discretion of the court.

In addition, the defendant claims that the court erred in not advising him of a possible insanity defense. Even assuming such an obligation on the part of the trial court, an examination of the record of trial reveals absolutely no intimation of such defense, either from the defendant or his counsel prior to his

being relieved by the court. Even the clinical record appended by the defendant to his brief indicates competency. What the record does reflect, however, is that the trial judge, prior to sentencing, requested and received from the medical authorities at Terminal Island, a report indicating the defendant to be in "satisfactory mental condition." [R. T. 298, lines 12-17].

CONCLUSION

For the reasons stated above, the appellee respectfully prays that the judgment of conviction be affirmed.

Respectfully submitted,

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